THE ATTORNEY GENERAL OF TEXAS

February 23, 1988

JIM MATTOX
ATTORNEY GENERAL

Mr. Edward H. Perry
Assistant City Attorney
City Hall
Dallas, Texas 75201

Open Records Decision No. 488

Re: Whether sections 3A and 3(a)(17) of the Texas Open Records Act, article 6252-17a, V.T.C.S., apply to governmental employees who have already retired (RQ-1264)

Dear Mr. Perry:

You received a request for the addresses of retired City of Dallas employees. You ask whether the Texas Open Records Act, article 6252-17a, V.T.C.S., requires that you release the home addresses of certain retired city employees. The 69th Texas Legislature amended the Open Records Act to protect from disclosure the home addresses and telephone numbers of public employees and officials who elect to close access to this information. Acts 1985, 69th Leg., ch. 750, at 2573. These changes responded to decisions of the Attorney General that the Open Records Act does not ordinarily protect the home addresses and telephone numbers of public employees who are not peace officers. See, e.g., Open Records Decision Nos. 169 (1977); 123 (1976). Prior to amendment, authority for withholding home addresses and telephone numbers under sections 3(a)(1) and 3(a)(2) of the Open Records Act depended upon a showing of "special circumstances" beyond a general desire not to be disturbed at home. Open Records Decision No. 169 (1977).

In 1985, the legislature amended section 3(a)(17) of, and added section 3A to, the Open Records Act. Section 3(a)(17) protects from required public disclosure

> the home addresses and home telephone numbers of each official and employee of a governmental body except as otherwise provided by Section 3A of this Act, and of peace officers as defined by Article 2.12,

> Code of Criminal Procedure, 1965, as amended, or by Section 51.212, Texas Education Code.

Section 3A provides:

> (a) An employee hired by a governmental body, and each official of the governmental body, shall choose whether or not to allow public access to the information in the custody of the governmental body relating to the official's or employee's home address and home telephone number. Each official and employee shall state that person's choice to the main personnel officer of the governmental body in a signed writing not later than the 14th day after the date on which the employee begins the employment with the governmental body, or the official is elected or appointed. If the official's or the employee's choice is to not allow public access to the information, the information is protected as provided by Section 3 of this Act. If an employee or official fails to report within the period established by this section, the information is subject to public access.
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> (b) If, during the course of the employment or the term of the office the employee or official wishes to close or open public access to the information, that individual may request in writing that the main personnel officer of the governmental body close or open access, as the case may be, to the information.

In Open Records Decision No. 455 (1987), this office held that if public employees elect, while employed, to protect their home addresses and telephone numbers from disclosure under sections 3A and 3(a)(17), governmental bodies may not release the information after the employment relationship ends. The decision was clear, however, that the right granted in section 3A applies only to current employees and officers; the right must be exercised "during the course of the employment or the term of office." Although the protection of section 3(a)(17), once fixed, continues after the employment relationship ends, the right granted in section 3A applies only to a specified category of people. For this reason, Open

Records Decision No. 455 held that sections 3(a)(17) and 3A do not include the home address and telephone numbers of applicants for public employment and other "private" persons such as probationers.

You ask whether section 3A applies to city retirees who retired before section 3A came into effect. You suggest that the legislative purpose behind sections 3(a)(17) and 3A apply equally to employees and retirees. You assert that the legislature could not have intended the protection of section 3(a)(17) to apply only to public employees who retire after the effective date of the amendment. You also suggest that the employment relationship between the city and its retirees does not end completely upon retirement.[1]

Although significant policy considerations may encourage applying section 3A to retirees, sections 3(a)(17) and 3A by their express terms apply only to governmental "employees" and "officials." If the legislature had intended to include retirees, it would have done so expressly. Additionally, the legislature would not have specified that the option of closing access to home addresses and telephone numbers be exercised "during the course of employment or the term of office." In Open Records Decision No. 455, this office indicated that sections 3A and 3(a)(17) do not include the home addresses and telephone numbers of applicants for public employment or of other persons such as probationers. Similar considerations apply to retirees. This office is not at liberty to expand the Open Records Act's exceptions to disclosure absent clear evidence that the legislature intended such expansion. See V.T.C.S. art. 6252-17a,

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1. Section 25.503 of Title 110B, governing the Public Retirement System, states that retirees' records are "considered to be personnel records" and are therefore to be treated as employees' records when the records are in the custody of the retirement system. See also Title 110B, §13.402. The records at issue are not in the custody of the state retirement system. Moreover, this provision clearly does not grant retirees affirmative rights granted to employees. See also Calvert v. Employees Retirement System of Texas, 648 S.W.2d 418, 420 (Tex. App. - Austin 1983, writ re'd n.r.e.) (holding that an identical provision did not make retirees' records per se confidential under the Open Records Act).

§14(d). Accordingly, the home addresses and telephone numbers of city retirees who were not peace officers and who retired prior to the effective date of section 3A may not be withheld under section 3(a)(17) of the Open Records Act.

This information may, however, trigger section 3(a)(1) of the Open Records Act. Absent a showing of special circumstances, common-law and constitutional privacy do not protect home addresses and telephone numbers. See Open Records Decision Nos. 169 (1977); 123 (1976); see also Open Records Decision No. 455 (1987). Consequently, section 3(a)(1) does not protect retirees' home addresses and telephone numbers absent a showing of special circumstances. See also Calvert v. Employees Retirement System of Texas, 648 S.W.2d 418, 420 (Tex. App. - Austin 1983, writ ref'd n.r.e.).

You indicate that the administrators of the City Employee's Retirement Board will incur substantial expense in complying with this request because each retiree's file must be individually reviewed to determine whether eligible employees elected under section 3A to close access to their home addresses and telephone numbers.[2] You note that in Attorney General Opinion JM-114 (1983) this office indicated that a governmental body may not ordinarily charge a requestor for employee time in editing from standard-size (up to legal size) records material protected from disclosure or in making standard-size records available for inspection under the act. In fact, the opinion stated that when "no reproduction is made, no costs are authorized. . . ." The opinion relied on the court's decision in Hendricks v. Board of Trustees of Spring Branch Independent School District, 525 S.W.2d 930 (Tex. Civ. App. - Houston [1st Dist.] 1975, writ ref'd n.r.e.). In Attorney General Opinion JM-292 (1984), this office indicated that the Open Records Act requires the requestor to pay the cost of excerpting material protected by section 3(a)(1) from information maintained in a form

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2. You suggest that this is not a reasonable expense of administering the retirement system. See Title 110B, §12.203 (administrators under a fiduciary duty to administer system solely in the interest of participants). Compliance with the law, including the Texas Open Records Act, article 6252-17a, V.T.C.S., must be deemed a "reasonable" expense of administering the system.

other than standard-size pages. See Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 687 (Tex. 1976), cert. denied 430 U.S. 391 (1977). The differing treatment stemmed from the differing language of subsections 9(a) and 9(b) of the Open Records Act and from the treatment given that language by the courts.

In 1987, the Texas Legislature amended these provisions with the following underscored language:

> (a) The cost to any person requesting noncertified photographic reproductions of public records comprised of pages up to legal size shall not be excessive. The State Board of Control shall from time to time determine the actual cost of standard size reproductions and shall periodically publish these cost figures for use by agencies in determining charges to be made pursuant to this Act. The cost of obtaining a standard or legal size photographic reproduction shall be in an amount that reasonably includes all costs related to reproducing the record, including costs of materials, labor, and overhead unless the request is for 50 pages or less of readily available information.
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> (b) Charges made for access to public records comprised in any form other than up to standard sized pages or in computer record banks, microfilm records, or other similar record keeping systems, shall be set upon consultation between the custodian of the records and the State Board of Control, giving due consideration to the expenses involved in providing the public records making every effort to match the charges with the actual cost of providing the records. The costs of providing the record shall be in an amount that reasonably includes all costs related to providing the record, including costs of materials, labor, and overhead. (Emphasis added.)

Acts 1987, 70th Leg., ch. 964, §1, at 6593-94.

The bill analysis to the amendment of subsections 9(a) and 9(b) states the general purpose of the amendment:

> As proposed, S.B. 560 requires the costs of reproduction and access to public records to be set at an amount that reflects the actual costs of materials, labor, and overhead associated with such reproduction and access.

Bill Analysis to S.B. No. 560, prepared for Senate Committee on State Affairs, 70th Leg. (1987).

Subsection 9(a) governs the cost of reproducing records stored in the form of standard-size (up to legal size) pages, whereas subsection 9(b) governs the cost of access to records stored in non-standard forms. Hendricks v. Board of Trustees of Spring Branch Independent School District, supra; Attorney General Opinions JM-292, JM-114. The charges authorized by the amendment of subsection 9(b) are fairly clear. The governmental body may levy charges for "all costs related to providing the record." The cost of deleting information deemed confidential under the act is a cost related to providing the record. Industrial Foundation of the South v. Industrial Accident Board, 540 S.W.2d at 687; Attorney General Opinion JM-292.

The charges authorized under subsection 9(a) present different questions: first, whether the charges apply only to reproductions of public records; and second, whether the specified charges may be levied only for requests of more than 50 pages. Under the act, the requestor may choose to see public records or to pay for the duplication of public records, or both. See Open Records Decision No. 152 (1977). Because subsection 9(a) governs the cost of "reproducing" records, the amendment to subsection 9(a) appears to authorize charges for materials, labor and overhead only if copies are provided and not if the requestor merely wishes to inspect records. As indicated, Attorney General Opinion JM-114 determined that when "no reproduction is made, no costs are authorized under subsection (a)." The bill analysis and legislative history of the amendment, however, suggest that the legislature intended to respond to concerns raised by the effect of opinion JM-114. See Bill Analysis to S.B. No. 560, prepared for Senate Committee on State Affairs, 70th Leg. (1987). Moreover, the option of access is not available if giving the requestor access to the records would give access to information deemed confidential under the act. See Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d at 687; Attorney General Opinion JM-672 (1987). Because

your request involves confidential information, we need not resolve this issue at this time.

The question remains as to whether charges may be made for finding and/or deleting information protected by section 3(a)(1) in requests for 50 pages or less of records comprised of standard-size pages. The State Purchasing and General Services Commission "continues to rely upon Attorney General Opinion JM-114 in determining recoverable costs for 50 page or less of readily available information." 12 Tex. Reg. 4524 (Dec. 4, 1987). Because Attorney General Opinion JM-114 denied any overhead-type or "access" charge, including the cost of deletion of confidential information, for standard-size reproductions, this statement has been construed to mean that no overhead charges may be made for requests involving 50 pages or less. Although this interpretation of the amendment to subsection 9(a) appears correct, it does not fully explain the amendment to subsection 9(a); it does not incorporate what constitutes "readily available information."

The amendment's legislative history and bill analysis both indicate that the legislature was responding to concerns of governmental bodies over requests for voluminous reproductions and extensive research. See Bill Analysis to S.B. No. 560, prepared for Senate Committee on State Affairs, 70th Leg. (1987). These concerns probably account for the qualification for "50 pages or less of readily available information." Requests for a limited number of documents do not ordinarily involve the same costs as requests for voluminous reproductions. On the other hand, extensive research may be required to produce a limited number of documents. See, e.g., Open Records Decision No. 467 (1987). There is evidence that the legislature intended to respond to concerns over the overall impact of Attorney General Opinion JM-114. This opinion addressed charges associated with voluminous requests, such as employee time in physically gathering and copying numerous records, and charges that may be associated with both voluminous and non-voluminous requests, such as employee time in searching for records and in deleting confidential information.

The Open Records Act prohibits the release of information "deemed confidential under the terms of this act." V.T.C.S. art. 6252-17a, §10(a). Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." See also V.T.C.S. art. 6252-17a, §§3(a)(2), 3(a)(7), 3(a)(9), 3(a)(17), 3(a)(18). These requirements

place governmental bodies in a difficult position when complying with requests that require the deletion of section 3(a)(1) information. As indicated, prior to amendment, the act was construed not to require the requestor to bear this particular cost of compliance with the act with respect to standard-size records. Attorney General Opinion JM-114.

Consequently, because the Open Records Act requires that governmental bodies delete confidential information and because that deletion may require extensive research time, the deletion of section 3(a)(1) material may be considered in determining whether information is "readily available" under subsection 9(a). In requests of 50 pages or less, if public information is intertwined with confidential information or if the governmental body must perform an extensive physical search to sort out confidential records, charges may be made for materials, overhead, and labor in deleting or separating the confidential information. The question of what constitutes "readily available" information depends on the facts in individual cases.

To verify the actual cost of making information available when a governmental body contends the information is not "readily available," however, governmental bodies must prepare affidavits describing the governmental body's editing and/or search procedure and the precise costs involved. The cost amendments were intended to require requestors to bear the actual cost of producing public records in compliance with the act, not to provide a mechanism to, in effect, deny access to public records. The governmental body should assure that the cost of complying with section 3(a)(1) is as little as is reasonably possible. Section 10(b) of the Open Records Act makes it a criminal offense to fail or refuse, with criminal negligence, to provide access to or copies of public records. Although charging excessive costs for copies of public records is not in and of itself an offense under subsection 10(b), charging excessive fees may constitute evidence of a violation of section 10(b). Attorney General Opinion JM-265 (1984).

S U M M A R Y

The home addresses and telephone numbers of city employees who were not peace officers and who retired prior to the effective date of section 3A of the Texas Open Records Act, article 6252-17a,

V.T.C.S., may not be withheld from public disclosure under section 3(a)(17) of the act in conjunction with section 3A. This information may be withheld under sections 3(a)(1) and 3(a)(2) only upon a showing of special circumstances related to privacy interests.

As recently amended, subsection 9(a) of the Open Records Act requires the requestor to bear the cost of access to or copies of up to legal-size public records, "including costs of materials, labor, and overhead unless the request is for 50 pages or less of readily available information." In requests involving 50 pages or less, the cost of deleting information deemed confidential under the Open Records Act may be considered in determining whether information is "readily available."

Very truly yours,

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